

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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UNITED STATES SECURITIES AND	:	
EXCHANGE COMMISSION,	:	
	:	
Plaintiff,	:	
	:	
- against-	:	
	:	Case No. : 11-cv-574 (MJD/FLN)
JASON BO-ALAN BECKMAN, et al.,	:	
	:	
-against-	:	
	:	
R.J. ZAYED,	:	
	:	
Receiver.	:	
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**MEMORANDUM OF LAW IN SUPPORT OF
EVEREST INDEMNITY INSURANCE
COMPANY’S MOTION TO LIFT ASSET FREEZE IN
ORDER TO PERMIT PAYMENT OF DEFENSE COSTS**

PRELIMINARY STATEMENT

Everest Indemnity Insurance Company (“Everest”), by its attorneys, brings this motion pursuant to Rule 71 of the Federal Rules of Civil Procedure for an Order granting limited relief from this Court’s Order Imposing Asset Freeze and Other Ancillary Relief and Setting Hearing on Motion for Preliminary Injunction dated March 8, 2011 (Docket No. 9, p. 9 of 11-CV-574) (the “Freeze Order”), to the extent applicable, to permit Everest to pay accrued and future defense costs, which it is obligated to pay pursuant to the terms and conditions of an insurance policy it issued to Western Securities, Inc. (“Western”). These defense costs were (or will be) incurred in connection

with the representation of certain individuals and entities, namely, Erik Erickson (“Erickson”), Paul Wood (“Wood”), Donald Bizub (“Bizub”), Adam Edenberg (“Edenberg”), Jason Bo-Alan Beckman (“Beckman”), Oxford Private Client Group, LLC (“Oxford PCG”) and Western (collectively the “Everest Insureds”). Everest is obligated to make payment of defense costs for the Everest Insureds under its policy and, at present, is being prevented from doing so by the Receiver based on the Freeze Order.

The Everest Insureds are Insureds under an Excess Insurance Policy (Policy No. FL5 EE0006-091) covering the period of March 1, 2009 to March 1, 2010 issued to Western International Securities, Inc. (“the Everest Policy”), which requires Everest to defend the Everest Insureds against covered claims. The Policy provides a maximum Limit of Liability of \$1,000,000 per Claim and \$1,000,000 in the aggregate, and is excess of a \$1,000,000 per Claim Limit of Liability provided by the primary insurance policy issued by Certain Underwriters at Lloyd’s, London (“Underwriters”), which has now been exhausted. The Policy further provides that the policy Limit of Liability is eroded by the payment of Claim Expenses, which includes, among other things, defense costs paid out under the Policy.

The Everest Insureds provided Everest with notice of claims under the Everest Policy, requesting that Everest reimburse their Claim Expenses¹, including

¹ All capitalized terms are taken from the Everest Policy (Photis Aff., ¶ 1, Ex. A) and the Underwriters Policy (*Id.*, ¶ 3, Ex. M) and shall have the same meaning as set forth therein.

defense costs, and, in some cases, damages.² Beckman and Oxford PCG are the only Everest Insureds that are defendants in this present action brought by the United States Securities and Exchange Commission (“SEC”). However, Beckman, Oxford PCG and the other Everest Insureds have also been named in other lawsuits, arbitrations and investigations (which will be discussed in more detail below). The Freeze Order and the interpretation of same by the Court Appointed Receiver have prevented Everest from meeting its contractual obligations to defend the Everest Insureds against these claims.

Specifically, the Court Appointed Receiver, R. J. Zayed, has taken the position that “the Court’s Freeze Order freezes all policies [of insurance] that benefit Mr. Beckman” (Docket No. 9, p. 9) and that there can be no erosion of the Everest Policy. However, as set forth above, the Everest Policy specifically provides that \$1,000,000 is the Insurer’s maximum aggregate liability under the Policy for all Loss, including payment of Claim Expenses, which includes, among other things, defense costs paid out under the Policy. (*See* Photis Aff., ¶ 1, Ex. A. – Section III, Limit of Liability). Thus, the unambiguous terms of the Everest Policy clearly express the contractual rights and obligations between Everest and the Everest Insureds, and provide for the circumstances under which Everest is obligated to pay Claim Expenses, resulting in the erosion of the Policy Limit of Liability.

Everest is now forced to bring the instant motion to have the Court amend the Freeze Order, to the extent it may apply, to allow it to do the following pursuant to

² Everest reserved rights with respect to its obligation, if any, to pay Damages in connection with the Claims. The issue of coverage for Damages is not before the Court.

the terms and conditions of the Everest Policy: make payments of \$230,545.54 in Claim Expenses previously incurred in the representation of the Everest Insureds and pay future Claim Expenses that may be incurred in connection with the Claims for which notice has been received under the Everest Policy and for which Everest has acknowledged coverage for Claim Expenses, all of which payments will reduce the available policy limits. As set forth below, Everest is contractually obligated under the Everest Policy to make payment of Claim Expenses, which the Policy specifically states reduces the Insurer's Limit of Liability, and such payments will not frustrate the purpose of the Freeze Order.

STATEMENT OF FACTS

A. The Claims At Issue

As set forth in the supporting Affidavit of Matthew Photis, a Claims Manager of Everest, each of the Everest Insureds have provided notice of one or more of the following matters to Everest for which they are seeking coverage under the Everest Policy, including the payment of Claim Expenses:

- 1) *United States Securities and Exchange Commission v. Jason Bo-Alan Beckman, et al.*, Case No. 11-cv-574 (MJD/FLN) filed in United States District Court District of Minnesota (“*SEC Action*”) (Photis Aff., ¶ 2.A., Ex. B);
- 2) *Howard and Sharon Phillips, et al. v. Trevor Cook et al.*, Case No. 09-CV-1732 filed in the United States District Court District of Minnesota (“*Phillips Action*”) (Photis Aff., ¶ 2.B., Ex. C);
- 3) *In the Matter of Arbitration of John and Lisa Sos and Western International Securities, Inc., Jason Bo-Beckman & NRP Financial, Inc.*, FINRA No. 09-05297 (“*Sos Arbitration*”) (Photis Aff., ¶ 2.C., Ex. D);

- 4) *In the Matter of the Arbitration of Dale and Ann Woodbeck, et al. v. Jason Bo Beckman, NRP Financial, Inc. and Western International Securities, Inc.*, (“Woodbeck Arbitration”) (Photis Aff., ¶ 2.D., Ex. E);
- 5) *In the Matter of Arbitration of Anne E. Quiggle, et al. v. Jason Bo Beckman, et al.*, (“Quiggle Arbitration”) (Photis Aff., ¶ 2.E., Ex. F);
- 6) *In the Matter of Arbitration of Ralph R. Abrahamson v. Western International Securities, et al.* (“Abrahamson Arbitration”) (Photis Aff., ¶ 2.F., Ex. G);
- 7) September 13, 2010 email from Matthew Boos, counsel for Paul Wood, advising of a claim or potential claim by Ronald Stolpman (“Stolpman Claim”) (Photis Aff., ¶ 2.G., Ex. H);
- 8) SEC subpoenas issued to a) Beckman dated June 21, 2010; b) Oxford c/o Jason Beckman dated June 23, 2009 and c) Oxford Global Advisors c/o Jason Beckman dated June 23, 2009 (the “Beckman Subpoenas”) (Photis Aff., ¶ 2.H., Ex. I);
- 9) SEC subpoena issued to Adam Edenborg (“Edenborg Subpoena”) (Photis Aff., ¶ 2.I., Ex. J);
- 10) FBI investigation including an interview of Paul Wood (“FBI Investigation”) (Photis Aff., ¶ 2.J., Ex. K);
- 11) *Gunvant Bhatt v. Western Instrument Services, Inc., NRP Financial, Inc. and Eric Erickson*, FINRA No. 11-01754 (“Bhatt Arbitration”) (Photis Aff., ¶ 2.K., Ex. L).

Everest has reviewed all of the notices received and has advised the Everest Insureds that, subject to certain reservations of rights, the Everest Insureds are entitled to coverage for Claim Expenses under the Everest Policy for the above enumerated lawsuits, arbitrations and investigations for the following reasons: (1) the Everest Insureds qualify as Insureds under the Everest Policy³; (2) the “Primary Policy,” is now exhausted (Everest Policy -

³ “Assured” is defined in the Underwriters’ Policy (at II. (1)), in pertinent part, to mean “(a) the Broker/Dealer” and “(e) any past, present or future Registered Representative of the Broker/Dealer, but solely for acts on behalf of the Broker/Dealer.” Section II, as

Section II.C. and G.); and (3) subject to certain reservations of rights, the Claims fall within the Insuring Agreements of both the Primary Policy and the Everest Policy, which provide coverage for Wrongful Acts committed by Insureds in rendering Professional Services. Under the Everest Policy, Claim Expenses include the payment of expenses to defend against the allegations in the lawsuits and arbitrations and to respond to the subpoenas in connection with the SEC and FBI investigations referenced above.

B. The Everest Policy

The Everest Policy is an excess policy which “follows form” to the primary policy issued by Underwriters. Accordingly, the Everest Policy Insuring Agreement (Section I) states as follows:

The “Insurer” will provide the “Insured” with insurance excess of the “Underlying Insurance” for “Loss” from “Claims” first made against the “Insured” during the “Policy Period.” It is expressly agreed that liability for any covered “Loss” shall attach to the “Insurer” only after the insurers of the “Underlying Insurance” and or the “Insureds” have paid in the applicable legal currency the full amount of the “Underlying Limit” and the “Insureds” have paid the full amount of the retention, if any, applicable to the “Primary Policy”. Except as otherwise provided in this policy, coverage under this policy shall apply in conformity with and subject to the warranties, limitations, conditions, provisions, and other terms of the “Primary Policy”, and to the extent coverage is further limited or restricted thereby, of any other “Underlying Insurance”. In no event will the coverage under this policy be broader than the coverage under any “Underlying Insurance”.

amended by Attachment (19) to the Underwriter’s Policy, defines the terms “Registered Representative” and “Registered Investment Advisor.” Among the Everest Insureds, Erickson, Bizub, Edenborg and Beckman fall within the definition of a Registered Representative. Western falls within the definition of a Broker Dealer, and Oxford PCG falls within the definition of Registered Investment Advisor.

The Everest Policy explicitly states on the Declarations page that: “THIS IS A CLAIMS-MADE POLICY. DEFENSE WITHIN LIMITS NOTICE: AMOUNTS INCURRED FOR CLAIM EXPENSES SHALL REDUCE THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS.” (Photis Aff., ¶ 1, Ex. A – Declarations page).⁴ Section III – Limit of Liability provides that Claim Expenses are part of, and not in addition to, the aggregate Limit of Liability and that Claim Expenses reduce the Insurer’s Limit of Liability, as follows:

SECTION III – LIMIT OF LIABILITY

⁴ Section II of the Everest Policy defines Claim, Claim Expenses, Insureds Primary Policy and Underlying Insurance and Underlying Limit, as follows:

SECTION II – DEFINITIONS

- A.** “Claim” and “Loss” shall have the meanings provided in the “Primary Policy”.
- B.** “Claim Expense(s)” means fees, costs and expenses covered under this policy which are incurred by the “Insureds” in connection with the investigation, defense, settlement and appeal of a “Claim”.
- C.** “Insureds” means the “Named Insured” and other entities and persons insured under the “Primary Policy”.

* * *

- G.** “Primary Policy” means the policy designated in Item 5.A. of the Declarations.
- H.** “Underlying Insurance” means the policy(ies) designated under Items 5.A. and B. of the Declarations.
- I.** “Underlying Limit” means the total limits of liability of all “Underlying Insurance”, as set forth in Item 5.C. of the Declarations.

The amount stated in Item 4. of the Declarations is the “Insurer’s” maximum aggregate liability under this policy for all “Loss”, including “Claim Expenses”, with respect to all covered “Claims”. “Claim Expenses” are part of, and not in addition to, such aggregate Limit of Liability, and the “Insurer’s” payment of “Claim Expenses” reduces the Limit of Liability.

C. The Primary Policy

Underwriters issued a Securities Broker/Dealer Professional Liability Policy (Policy No. NA091275) to Western covering the policy period of March 1, 2009 to March 1, 2010 with Limits of Liability of \$1,000,000 per claim and \$3,000,000 in the aggregate (“the “Underwriters’ Policy”). (Photis Aff., ¶ 3, Ex. M). Multiple interrelated Claims, including the civil litigations, FINRA arbitrations, SEC investigations and FBI Investigations set forth on pages 4-5, were reported by the Everest Insureds under the Underwriters’ Policy and/or the Everest Policy. Underwriters accepted the notices provided by its Assureds and, subject to a reservation of rights, reimbursed covered Claims Expenses on the basis the Everest Insureds were Assureds under the Underwriters’ Policy⁵. In so doing, Underwriters relied on its policy’s Insuring Agreements, the definitions of Assured, Registered Representative, Claim/Interrelated

⁵ The lawsuits, arbitrations, subpoenas and investigations enumerated on pages 4-5 herein fall within the definition of the term “Claim” as set forth in the Underwriters’ Policy (at Section II (3)). Moreover, the Claims are “interrelated” pursuant to term “Interrelated Wrongful Act(s)” as defined in the Underwriter’s Policy (at Section II (6)), to mean “Wrongful Acts which are logically or casually connected by reason of any common fact, circumstance, situation, transaction, casualty, event, decision or series of facts, circumstances, situations, transactions, casualties, events or decisions.”

Claim, Wrongful Act, Professional Services, the Limits on Defense Obligation, the Duty to Defend and Loss.

1. The Insuring Agreements

The Insuring Agreements⁶ section of the Primary Policy issued by Underwriters provides that the Primary Policy shall pay on behalf of the Assureds for Claims first made during the Policy Period and reported in accordance with the Policy

⁶ Insuring Agreement I.A. and I.B. as amended by Registered Investment Advisor Endorsement - Attachment (19), state as follows:

I. INSURING AGREEMENTS

A. BROKER/DEALER PROFESSIONAL LIABILITY INSURANCE

This policy shall pay on behalf of the **Assured** as defined in subparagraphs (a), (b), (c) or (d) of the definition of **Assured** and **Loss** arising from **Claims** first made against such **Assured** during the **Policy Period** or the Extended Reporting Period (if applicable) and reported in writing to the Underwriters pursuant to the terms of this policy for any actual or alleged **Wrongful Act** committed by such **Assured** in the rendering or failure to render **Professional Services** on or after the **Retroactive date**.

B. REGISTERED REPRESENTATIVE PROFESSIONAL LIABILITY INSURANCE

This policy shall pay on behalf of a Registered Representative acting in his/her capacity as a Registered Investment Advisor Loss arising from a Claim first made against the Registered Representative during the Policy Period or the Discovery Period (if applicable) and reported in writing to the Insurer pursuant to the terms of this policy for any actual or alleged **Wrongful Act** committed by the Registered Representative in the rendering or failure to render Professional Services.

notice provisions for actual or alleged Wrongful Acts committed in the rendering or failure to render Professional Services. Both Underwriters and Everest, subject to their respective reservations of rights, determined that the allegations in the actions enumerated above fall within the Insuring Agreements, which triggered Underwriters' duty to defend and, upon exhaustion of the Primary Policy, triggered Everest's duty to defend.

2. Duty to Defend and Limitations on Defense Obligation

The Insuring Agreement of the Underwriters' Policy, at paragraph I.C., sets forth the obligations on the part of the insurer (and by virtue of the follow form nature of the Excess Policy, the obligations of Everest) for Defense, Investigation and Settlement, including the duty to defend up to the Limit of Liability "even if any of the allegations of the Claim are groundless, false or fraudulent."

Section II (4) of the Underwriter's Policy defines the term "Claims Expenses", (in pertinent part), to mean "those reasonable fees, costs and expenses incurred by outside counsel consented to by Underwriters to defend the Assured, and all other costs and expenses incurred for the investigation, adjustment, settlement, arbitration, mediation, defense or appeal of a Claim which is covered under the terms of this policy."

D. Exhaustion of Underwriters' Policy and Claims to Everest

Underwriters notified Everest that as of November 15, 2010, Damages and Claims Expenses incurred under the Underwriters' Policy in connection with the interrelated Claims submitted by its Assureds exceeded its full \$1 million Limit of

Liability. (Photis Aff., ¶ 3, Ex. N). Since then, the defense counsel for the respective Everest Insureds have continued to incur Claim Expenses. As set forth in the Photis Affidavit, at ¶ 5 and Exhibit O, the Everest Insureds and their counsel have submitted invoices to Everest for Claim Expenses (defense costs and expenses) requesting payment of a total of \$230,545.54 to date under the Everest Policy, and it is fully expected they will continue to submit additional invoices which constitute Claim Expenses in the future.

E. The Receiver Contends that the Everest Policy is Subject to the Freeze Order

In an effort to meet its contractual obligations to the Everest Insureds without engaging in unnecessary motion practice before this Court, Everest first requested that the Receiver consent to provide Everest with limited relief from the Freeze Order in order to permit Everest to defend the Everest Insureds. In response, the Receiver has made clear to Everest and its counsel that he regards the Everest Policy as a Receivership Asset that is subject to the Freeze Order because it provides a benefit to Beckman, and that no erosion of the Limits of Liability can take place. (See Barry Aff., ¶¶ 2-4, Exs. A-B). The Receiver also articulated this position to the Court in Receiver's Memorandum in Support of Motion to Enjoin Distribution of Settlement Proceeds to the FINRA Claimants (dated April 29, 2011) in this consolidated action (See 09-CV-3333, Docket No. 776 at 16 and 11-CV-574, Docket No. 67 at 16) as follows:

The additional concessions the FINRA Claimants obtained from NRP, Western, and Beckman in the three settlement agreements also violate the Court's Receivership Orders. For example, the settlement agreements permit the FINRA Claimants to seek millions more from insurers, including

Scottsdale Insurance Company and Everest Indemnity Insurance Company, who issued policies that benefit Beckman.

Because these insurance policies are held for the benefit of Beckman, they are Receivership assets and are frozen by the Court's Orders. *See Order Imposing Asset Freeze and Other Ancillary Relief*, No. 09-cv-3333 at 3; *Order Imposing Asset Freeze and Other Ancillary Relief And Setting Hearing on Motion for Preliminary Injunction*, No. 11-cv-0574, Docket No. 9, at 2-3 and 9. The Scottsdale Insurance Company's policy specifically identifies Bo Beckman as an insured. (Lockner Decl., ¶ 12; Ex. 11.) Similarly, the Everest Indemnity Insurance Company, under Policy No. FL5EE00006-091, defines the Assured as including registered representatives of the broker-dealer, *e.g.*, Beckman. (Lockner Decl., ¶ 13; Ex. 12, ¶II(e).

Everest maintains the Receiver's position ignores the following: (1) the Policy insures not only Beckman, but also Western and all Registered Representatives of Western; (2) Everest and its Insureds have a contractual relationship, and its contractual rights and obligations are being thwarted by the position taken by the Receiver; and (3) the Everest Policy proceeds are not "investor funds and assets" until and unless there is a judgment against an Insured or a written agreement of the Insurer determining the liability of an Insured to such investors that is covered under the Everest Policy terms and conditions. Everest has determined that the Claims against the Everest Insureds have triggered the "duty to defend" provisions of the Everest Policy, however, there has been no determination as to coverage for any liability of any Everest Insured and there have been no adjudications, by judgment or otherwise, of liability of any Insured.

F. The Freeze Order and Everest's Request for Relief

The Receiver's position towards the Everest Policy is based primarily on this Court's Order Imposing Asset Freeze and other Ancillary Relief and Setting Hearing on Motion for Preliminary Injunction in *U.S. Securities and Exchange Commission v. Jason Bo-Alan Beckman and The Oxford Private Client Group, LLC and Hollie Beckman*, 11-cv-574 (MJD/FLN), Docket No. 9 at p. 9, which states in relevant part that:

IT IS HEREBY FURTHER ORDERED that the assets frozen by this Order also include, but are not limited to, any insurance policies or proceeds for which any Defendant, Relief Defendant, and/or Related Entity is a covered person or beneficiary.

Everest has received demands for payment of \$230,545.54 in Claim Expenses to date and expects additional demands for the payment of Claim Expenses to continue. The terms and conditions of the Everest Policy require it to make payment of the Claim Expenses incurred. Based on the above, Everest requests that the Court clarify and, if necessary, amend, the Freeze Order to permit Everest to make payment of the Claim Expenses incurred to date and make future payments of Claim Expenses going forward. As more fully set forth below, this relief is not inconsistent with the purpose of the Freeze Order.

ARGUMENT

POINT I

**THE COURT'S INTERVENTION IS REQUIRED PURSUANT TO
FRCP RULE 71 BECAUSE EVEREST IS OBLIGATED TO DEFEND ITS
INSUREDS**

Everest now seeks relief from the Freeze Order, to the extent applicable, pursuant to FRCP Rule 71, which provides that “[w]hen an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.” In essence, Rule 71 provides for enforcement of orders by or against a person or entity who is not a party to an action. Here, the Receiver contends the Freeze Order prevents Everest from making any payment from the Everest Policy that would decrease the policy limits. Everest submits that in accordance with the terms and conditions of the Everest Policy, it is obligated to make payments for Claim Expenses owed to date and could become obligated to make payment of future Claim Expenses. Further, by the terms of the Everest Policy, such payments will erode the Limit of Liability. Therefore, enforcing the Freeze Order against Everest is obstructing its contractual rights and obligations, and the dispute between Everest and the Receiver regarding the scope of the Freeze Order requires the intervention of this Court.⁷

A. Enforcement of the Freeze Order Against Everest is Contrary to the Contractual Rights and Obligations of Everest and the Everest Insureds

The Receiver has taken the position that Everest cannot make any payments under the Everest Policy that will erode the Policy’s limits. Since any Claim Expense payment will, by the terms of the Policy, erode the Policy Limit, the Receiver’s position means that Everest cannot make any payment of Claim Expenses. Accordingly, the Receiver has placed Everest and the Everest Insureds in a position where they cannot

⁷ As a nonparty, Everest had neither notice of nor opportunity to oppose the Freeze Order prior to its issuance.

fulfill certain of their respective contractual rights and obligations. In addition, the position of the Receiver will potentially prejudice the Everest Insureds in that they will not be able to defend themselves in pending Claims.

Under the law of almost all jurisdictions⁸, including Minnesota, analysis of insurance policies is governed by general principles of contract interpretation. *In re: SRC Holding Corp.*, 545 F.3d 661, 666 (8th Cir. 2008) (quoting *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998)). See *Lienemann v. King*, 832 F. Supp. 257, 259 (W.D. Ark. 1993); *Conway v. Farmers Home Mut. Ins. Co.*, 26 Cal. App. 4th 1185, 1191 (Cal. Ct. App. 1994); *Ferguson v. Allied Mut. Ins. Co.*, 512 N.W.2d 296 (Iowa 1994); *Alfin, Inc. v. Pacific Ins. Co.*, 735 F. Supp. 115, 118 (S.D.N.Y. 1990); *Webster v. U.S. Fire Ins. Co.*, 882 S.W.2d 569 (Tex. App. 1994). Here, Everest has acknowledged an obligation to pay Claim Expenses under the terms and conditions of the Everest Policy to the Everest Insureds in connection with the lawsuits, arbitrations, subpoenas and investigations enumerated on pages 4-5, which in turn reduce the Limit of Liability as dictated by the terms of the Policy. Thus, the concern on the part of Everest is clear: if it cannot make payment of Claim Expenses pursuant to the terms and

⁸ There are issues as to the applicable law which may apply in connection with interpretation and construction of the Everest Policy terms and conditions. Everest does not concede that Minnesota law is applicable to interpretation of the Policy terms and conditions. The Policy was issued to Western in California. However, the choice of law issues need not be addressed herein. In the event of any litigation with respect to coverage under the Everest Policy for any judgment or settlements, Everest reserves its rights to contest the applicability of Minnesota law.

conditions of the Everest Policy, it cannot fulfill its obligation which, among other issues, may prejudice its Insureds in defending the pending Claims.

1. Everest has expressly reserved its rights with respect to any Damages (defined in the policy as “a judgment, award or settlement including any interest thereon”), but coverage for the duty to defend is distinct from and broader in scope than the insurer’s duty to indemnify in three ways: “(1) the duty to defend extends to every claim that ‘arguably’ falls within the scope of coverage; (2) the duty to defend one claim creates a duty to defend all claims; and (3) the duty to defend exists regardless of the merits of the underlying claims.” *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 301-02 (Minn. 2006). Under Minnesota law, an insurer’s obligation to defend is contractual. *FACE, Festivals and Concert Events, Inc. v. Scottsdale Ins. Co.*, 632 F.3d 417, 420 (8th Cir. 2011) (citing *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997)). In determining whether a duty to defend exists, the court looks at the duty as of the time the insured tendered the defense to the insurer. *FACE*, 632 F.3d at 420. (citing *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 166 (Minn. 1986). This duty arises if any part of the cause of action is arguably within the scope of policy coverage. *FACE*, 387 N.W.2d at 420 (citing *Jostens, Inc.*, 387 N.W.2d at 165). *See Storek v. Fiduciary and Guar. Ins. Underwriters, Inc.*, 504 F. Supp. 2d 803, 808-10 (D. Cal. 2007); *Aetna Cas. and Surety Co. v. Dow Chem. Co.*, 44 F. Supp. 2d 847, 852 (D. Mich. 1997); *Zurich-American Ins. Co. v. Atlantic Mut. Ins. Co.*, 139 A.D.2d 379, 384-85 (N.Y. App. Div. 1988); *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687, 695 (5th Cir. 2010); *U.S. Fire Ins. Co. v. Green Bay Packaging, Inc.*, 66 F. Supp. 2d 987, 995 (D. Wis. 1999).

In analogous situations, bankruptcy courts have lifted the automatic stay in order to allow for the payment of defense costs from an insurance policy to directors and officers. *See, e.g., In re Cybermedia, Inc.*, 280 B.R. 12 (Bankr. D. Mass. 2002); *In re*

Enron Corp., 2002 WL 1008240 (Bankr. S.D.N.Y. 2002). In *Cybermedia*, the debtor maintained an insurance policy that provided coverage to directors and officers of Cybermedia and provided coverage directly to Cybermedia itself. *In re Cybermedia, Inc.*, 280 B.R. at 14. Similar to the fact that in the instant matter the SEC has a complaint filed against two Everest Insureds, the Trustee of Cybermedia filed a complaint against two former directors of Cybermedia. *Id.* at 14. The former directors sought payment of defense costs from the policy. *Id.* The Trustee responded that the former directors did not have a right to payment of defense costs because such payment would deplete the funds available to the claimant-debtor under the policy. *Id.* at 14-15. The Court stated:

[t]here is cause to lift the automatic stay because [the former directors] may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments. [The former directors] are in need *now* of their contractual right to payment of defense costs and may be harmed if disbursements are not presently made to fund their defense of the Trustee's Complaint.

Id. at 18 (emphasis in original). See *In re Youngstown Osteopathic Hosp. Ass'n*, 271 B.R. 544, 550-51 (Bankr. N.D. Ohio 2002) (directors entitled to proceeds of D&O policy even though debtor is the named insured on the policy, since the policy was procured for the benefit of directors and officers); *In re Boston Reg'l Med. Ctr., Inc.*, 285 B.R. 87, 97 (Bankr. D. Mass, 2002) (holding that the insurer was required to pay defense costs of the officers and directors relating to the procurement of experts and recognizing that, although the debtor had rights in the policy at issue, the directors and officers also had rights in the policy entitling them to payment of certain defense costs despite the fact that Claims against the policy would likely exceed the policy limit). See also *In re Adelpia Commc'ns Corp.*, 298 B.R. 49 (S.D.N.Y. 2003) (vacating bankruptcy court stay of litigation relating to Rigas family's entitlement to D&O insurance funds).

Here, the Everest Policy is a duty to defend policy. If the Freeze Order is enforced against Everest, it will be unable to pay its Insureds' Defense Costs. If the Insureds' respective counsel's fees are not paid, then defense counsel could seek to withdraw their representation, potentially prejudicing the respective Insureds. The Everest Insureds "may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments". Clearly, the Freeze Order does not take into account the contractual nature of the Policy and the unavoidable erosion of Policy Limits. As a result, enforcement of the Freeze Order against Everest is unilaterally interfering with Everest's ability to comply with its contractual obligations and is potentially prejudicing its Insureds. Therefore, the Court's intervention is needed to allow Everest to carry out its contractual obligations by making payment of Claim Expenses, recognizing that such payments will erode the limits of the Everest Policy.

B. The Scope of the Receivers Interpretation of the Freeze Order is Overbroad and Does Not Further Its Purpose

The Receiver's position with respect to the Freeze Order is overbroad and is not in the allegedly defrauded investors' interests. It is well settled that a district court has authority to enter an asset freeze order in an SEC enforcement action. *SEC v. Petters*, 2009 U.S. Dist. LEXIS 98015, at *5 (D. Minn. 2009) (citing *SEC v. Manor Nursing Ctrs.*, 458 F.2d 1082, 1105-6 (2d Cir. 1972)). In turn, a district court has the "corollary authority to release frozen personal assets, or lower the amount frozen." *Petters*, 2009 U.S. Dist. LEXIS, at *5 (quoting *SEC v. Duclaud*, 170 F. Supp. 2d 427, 429 (S.D.N.Y.

2001)). In determining whether an asset freeze is appropriate, a court must weigh “the disadvantages and possible deleterious effect of a freeze...against the considerations indicating a need for such relief.” *SEC v. Quan*, 2011 U.S. Dist. LEXIS 47471, at *15 (D. Minn. 2011) (quoting *Manor Nursing Ctrs.*, 458 F.2d at 1106).

Here, the Receiver’s application of the Freeze Order is overbroad because it covers funds that are not tainted and belong, in part, to people who are not accused in the present SEC action of wrongdoing. The Everest Policy does not solely insure Beckman; Policy coverage extends to Western and all of its Registered Representatives and other Insureds. Outstanding defense fees were incurred by five people and two entities, only two of which, Beckman and Oxford PCG, are defendants in the pending SEC action. However, even Beckman and Oxford PCG are Insureds and entitled to a defense under the Everest Policy. Similar to the factual situation in *Cybermedia*, the Receiver has “frozen” the policy proceeds needed by Beckman and Oxford to defend the Claims brought by the SEC. The effect is that the SEC has alleged wrongdoing against Beckman and Oxford and, through the Receiver, prejudiced any ability of Beckman and Oxford to defend against those allegations. Everest submits that if it is not permitted to make payment of such Claim Expenses, the Everest Insureds will be deprived of the insurance policy proceeds for which they paid a premium, will be unable to defend themselves against the Claims brought against them and may be prejudiced as a result thereof. The Receiver has simply given no consideration to Everest’s contractual duty to defend under the Everest Policy or the Insureds’ contractual rights under the Policy.

Moreover, the stated purpose of a freeze order is to compensate defrauded investors. To date, there has not been a single adjudication against any of the Everest Insureds to provide any basis for payment of Policy proceeds to investors. In addition, Everest has not yet made a determination as to whether any judgment against an insured would be a covered “Damage” under the terms and conditions of the Policy and has, in fact, reserved all rights on that issue. The Primary Policy, which in turn is followed by the Everest Policy, expressly provides that third-party non-insureds do not have any rights under the policy unless and until there is a judgment or award against the Insureds, stating as follows:

No action shall lie against the [Insurer] unless, as a condition precedent thereto, there shall have been full compliance with all terms of this insurance, nor until the amount of the [Insured’s] obligation to pay shall have been finally determined either by judgment or award against the [Insured] after actual trial or arbitration on the merits, or by written agreement of the [Insured] , the claimant and the [Insurer]

...No person or organization shall have any right under this insurance to join the [Insurer] as a party to an action or other proceeding against the [Insured] to determine the [Insured’s] liability, nor shall the [Insurer] be impleaded by the [Insured] or its legal representative...

Thus, while the stated purpose of the Freeze Order is to avoid “investor funds and assets” which may be “dissipated, concealed or transferred from the jurisdiction of this Court”, there is no basis to enforce the Freeze Order against an insurance policy issued to Western, which provides coverage to Western and many other Insureds, and which may or may not provide any coverage for Claims that may or may

not be brought by investors against such Insureds. There is no basis to suggest that the Everest Policy is an “investor fund or asset”.

Based on the above, Everest respectfully requests that the Freeze Order, to the extent it applies, be lifted, or in the alternative modified, as against the Everest Policy and that Everest be permitted to make payment of Claim Expenses incurred to date and going forward.

CONCLUSION

Based on the foregoing it is respectfully requested that Everest’s motion pursuant to Fed. R. Civ. P. 71 be granted and that Everest be permitted to make payment of the Claims Expenses set forth in the Photis Affidavit, as well as all future Claims Expenses incurred pursuant to the terms and conditions of the Everest Policy, and for such other and further relief as this Court deems just and proper.

Respectfully submitted:

Dated: September 6, 2011

s/ Charles E. Spevacek
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